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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 476

SEARS, ROEBUCK AND CO., *Petitioner*,

v.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

and

FRANCIS SPERANDEO, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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Petitioner, Sears, Roebuck and Co., files this Reply Brief in order to respond to various contentions, which relate both to the merit of this appeal and to its alleged mootness, which were raised in the briefs of the Respondent Union, the Respondent Regional Director, and the AFL-CIO as *amicus curiae*.

I.

ON THE MERITS OF THE APPEAL

A basic component of Sears' contentions in this case is that appellate review is a mere continuation of a proceeding already instituted and is not a separate, independent cause. *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137. Thus, a charging party's efforts to test the correctness of an adverse decision in a suit properly lodged by the Board in an appropriate court does not constitute the legal equivalent of an independent initiation of a case, particularly where, as here, the appellate contentions of the charging party merely repeat those which the Board had previously made to the inferior court. Unfortunately, neither the Respondents nor the *amicus* have ever addressed themselves to the concept or the implications of appellate review as constituting only a part of a single continuous action; rather, they devote a substantial portion of their argument to the proposition that charging parties may not act unilaterally, directly and independently to initiate suits for injunctive relief without the prior participation or action by the Board. While this proposition is correct, it is not material to Sears' contentions. To that extent, the arguments of the parties have proceeded along parallel rather than converging lines.

Other opposing arguments invite more extended reply.

A. "POLICY CONSIDERATIONS" DO NOT WARRANT A DENIAL OF CHARGING PARTIES' RIGHT TO APPELLATE REVIEW.

The Regional Director argues (Br. pp. 17-19) that the decision as to whether to appeal a denial of injunctive relief under Section 10(l) involves such delicate considerations that such a decision should be entrusted solely to the Board. In support of this assertion, the Director is able to provide only a single basis for concluding that any prejudice to the Board might result from granting charging parties the right of appellate review. This basis con-

sists of the Director's fear that an adverse appellate court decision on a charging party's petition for temporary injunctive relief would unduly influence that court in a subsequent action by the Board for a permanent injunction predicated on a complete evidentiary record. Such a view reflects a startling lack of confidence in the appellate courts to function properly in the adjudication of each case before them. This view also ignores the fact that when the Board's representatives have concluded that a violation of law has occurred and charging parties' rights and interests are in jeopardy, then those charging parties should be entitled to the immediate relief which the Act provides for their benefit. Moreover, each of the reasons cited by the Director which is said to justify entrusting to him the exclusive right to determine whether appellate review should be sought in 10(l) cases (excluding decisions made for manpower or budgetary reasons), is predicated on the Director's alleged desire to prevail in the ultimate litigation on the underlying merits of the parties' dispute. However, such an ultimate "victory" would afford little solace to the charging party without earlier injunctive relief from the damaging effects of continuing unlawful picketing and boycotts."

Moreover, the fact that the Director persists in the prosecution of a Complaint before the Board necessarily establishes his belief that the charging party's rights were unlawfully infringed. Otherwise, the Director would be guilty of harassing an innocent respondent merely in order to test a legal principle. Nor is it reasonable for the Director to suggest (Br., p. 18, fn. 12) that he should have the discretion to prevent the appeal of a non-meritorious case to the Court of Appeals so as to improve his chances of winning it before the Board. If a case is worthy of prosecution before the Board on the grounds that a charging party's rights were violated, and if the violation of those rights entitle the charging party to temporary injustive relief pending the Board's adjudication, then, con-

trary to the Director's position, every avenue should be open to the charging party to obtain such injunctive relief, including appellate review.[1]

Similarly, the Director's assertion that he should have the exclusive right to manage and control the entire course of litigation in all injunction proceedings under Section 10(l), including the sole decision as to whether to seek appellate review, is unsound. The Director is not authorized to exercise such control in proceedings before the agency; no basis has been suggested to justify according him a greater role before the courts. For example, in a hearing before a Trial Examiner on the Director's Complaint, the Director may not control the extent and nature of the charging party's participation in the examination of witnesses. *Spector Freight*, 141 NLRB 1110. Nor may the Director freely withdraw elements of his Complaint without the permission of the charging party. *General Maintenance Engineers*, 142 NLRB 295. Nor may the Director settle the case and withdraw his Complaint without affording the charging party a hearing on his objections to the settlement; nor may the Director deprive the charging party of appellate review of the Director's decision to settle. *Leeds & Northrup* v. *NLRB*, 357 F. 2d 627 (CA 3, 1966).

In *Retail Clerks Union* v. *Food Employers Council*, 351 F. 2d 525 (CA 9, 1965), the Ninth Circuit specifically held that the same inability of the Regional Director completely

[1] It should additionally be noted that the Director's alleged reasons for failing to appeal the denial of injunctive relief in this case, which reasons are suggested in his brief (p. 18), were never communicated to Sears despite Sears' request for that information. Attached as Appendices G and H (pp. 32-33) are copies of Sears' request and the Director's reply. Under such circumstances, "the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action . . .'" *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444.

to control the course of litigation before the agency also applies in cases under Section 10(l). Although that court approved the granting of injunctive relief at the urging of the charging party and over the Director's objections, both the Director and Respondent Union have attempted to characterize the case as holding only that a district court has discretion to afford "appropriate" relief whether requested by the Director or not. (Dir. Br., p. 21; Union Br., p. 36).

Such a limited interpretation of that case will not survive analysis. If the Director does not seek injunctive relief the court will not grant it *sua sponte*. It is not enough to say that the filing of a petition confers jurisdiction on the court to grant any appropriate relief; who has standing to urge that relief on the court when the Director determines not to do so? The *Retail Clerks* case held, therefore, not only that the filing of the petition confers jurisdiction on the courts, but also that charging parties have standing to move independently of the Board to urge such relief when the Board is unable or unwilling to do so. Indeed, this is the explanation for the Court's extensive discussion of the nature of charging parties' rights in cases under Section 10(l). Were the Court merely limiting its holding to the narrow issue of the presence of the Court's jurisdiction, and not to the question as to how and at whose urging it would be exercised, then its analysis of charging parties' rights would constitute merely an extended superfluity; its decison would then leave the parties as uninformed as to their claimed rights as they were before the Court undertook to adjudicate them. It should be clear that the *Retail Clerks* Court neither intended nor achieved so limited and peculiar a result.

The next step is dictated by logic. If charging parties may urge the correctness of the Director's petition in the district court when the Director elects not to do so, then may they not similarly urge its correctness in the appellate courts when the Director similarly elects not to do so. In each case the charging parties do nothing more than to seek

to persuade a court that the Director's request for relief was appropriate and should be granted for the reasons stated in that petition. In both cases the charging parties in no way expand on his position: the petition they support is the Director's; the factual bases alleged were alleged by the Director; the theories propounded were also propounded by the Director; and the relief sought is that which is consistent with the facts, theories, and legal principles upon which he relied and which were summarized in his petition.

B. THE NORRIS-LA GUARDIA ACT DOES NOT BAR APPELLATE REVIEW BY CHARGING PARTIES.

The attempted reliance by the Respondent Union, and the AFL-CIO on the provisions of Norris-LaGuardia and its legislative history to defeat the limited and circumscribed right of appeal herein sought by Sears is patently inappropriate. (Union Br. 25-31; AFL-CIO Br. 8-12). Section 7 of Norris-LaGuardia prescribes strict procedural requirements for the initial issuance of an injunction in a labor dispute and Section 4 lists the kinds of acts which gave rise to the abuse of power by the federal judiciary in exercising its injunctive powers. (*Textile Workers* v. *Lincoln Mills*, 353 U.S. 448). A review of these provisions and their legislative history plainly indicates that to afford to Sears the right herein sought would not serve to revive any of the abuses against which that Act was aimed or endanger the protections against indiscriminate injunctions which the Act clearly forbids. *Textile Workers, supra.*

To afford a charging party (whether employer or union) a full participatory role in a 10(l) proceeding only after the Board has initiated such action in the district court, including a right to appeal from a denial of injunctive relief, in no way conflicts with the paramount danger of judicial abuse with which Congress was concerned during

the legislative debate preceding the enactment of Norris-LaGuardia. It cannot be said, for example, that the allowance of an appeal would serve to reinstate the federal judiciary as "an agency for strike-breaking purposes" or allow federal courts to revive the practice of issuing temporary restraining orders without notice which, *inter alia*, had enjoined such lawful acts as the publication of information about a strike in the newspapers (75 Cong. Rec. 5481); the publicizing of "yellow-dog contracts" (75 Cong. Rec. 5481); or appealing from a forced eviction from Company housing in the state courts even though such right is afforded by state law (75 Cong. Rec. 4507). It was to correct these and related abuses (*e.g.*, the issuance of injunctions based on perjured affidavits without even affording the union notice of the proceeding (75 Cong. Rec. 5479); and the judicial sanction of "yellow-dog" contracts (75 Cong. Rec. 4915)), which prompted the corrective legislation. Norris-LaGuardia was never intended, as Congressman LaGuardia stated, to "prevent the court from restraining any unlawful act", nor does it express a policy hostile to the right to appeal which Petitioner seeks under Section 10(l) of the National Labor Relations Act. (75 Cong. Rec. 5478).

Illustrative of Congress' purpose in enacting Norris-LaGuardia are the following quite typical extracts from the debates in the House of Representatives.

The judicial abuses for whose eradication the statute was drafted were described by Rep. O'Conner to include:

> "Forbidding the unions to pay any strike benefits to strikers; forbidding any person, whether a member of the union or not, to give any aid or assistance to the strikers. Often the injunctions have gone so far as to forbid attorneys to advise the strikers as to their rights even in proceeding to dispossess the strikers from their homes. Again some injunctions have prohibited the strikers from giving any publicity to the existence of

the strike or the reason for it, or their justification of it. (75 Cong. Rec. 5463).[2]

These debates revealed not only that the abuses sought to be corrected were totally unrelated to the existence of appellate rights such as Sears seeks here, but also that Congress did not intend this legislation to constitute a blanket bar of injunctive relief in such unrelated areas. According to Rep. Oliver:

> "Injunctions have been used most oppressively in this country. A court issued an injunction to the effect that no striker might talk to another striker about the strike;

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[2] Another principal abuse which the statute was designed to correct was the denial of a jury trial for contempt in labor disputes. Rep. Browning highlighted this aim when he said:

> "We have situation now by which a man may be enjoined by a federal court without notice, and either through ignorance or intention he violated the injunction. He is arraigned by the court, which is not only the legislature but the jury, the trial judge and the prosecuting attorney; the man is sent to jail, without trial by jury, which is guaranteed to him under the Constitution; and then another court on appeal, two or three years later, will decide that the injunction was wrongfully issued. However, that man has been punished, not only wrongfully, but punished contrary to the fundamentals of the Constitution. I would say that it is not right for such a practice to be perpetuated in this free country of ours, and that is one of the things which is being objected to in the passage of this Bill."

To which Rep. LaGuardia added:

> "This Bill does not prevent the Court from restraining any unlawful Act. This Bill does prevent the federal court from being used as an agency for strike-breaking purposes and as an employment agent for scabs to break a lawful strike. That is what the Bill does. . . . It prevents the federal court from granting an injunction without the hearing of testimony. That is all there is to that. It prevents the courts from prohibiting the performance of lawful acts. It provides for a trial by jury, as was provided in the Act of 1914. It outlaws the yellow-dog contract." (75 Cong. Rec. 5478)

that a striker could not publish in the newspaper that there was a strike; he could not telegraph, telephone or write to anyone in America that there was a strike; that a striker might not even say there was a yellow-dog contract, signed with his name, but coerced from him by his bosses. *We are not trying to have injunctions stopped, but we do not want injunctions which repeal the constitutional and natural rights of labor.*" (75 Cong. Rec. 5481) (Emphasis added)

Similarly, from Rep. Sweeney:

"This measure was intended to curb the abusive power registered by certain federal judges in the promiscuous issuing of injunctions arising out of labor disputes. *It has application only to the inferior federal courts of the nation, and limits the jurisdiction and power of those inferior federal courts.*" (75 Cong. Rec. 5502)

Furthermore, to view the negligibly number of instances when charging parties might desire to appeal from an adverse district court decision as reviving the pre-1932 danger of a "systematic distortion of the judicial function at the behest of business interests with a personal stake in the outcome", is frivolous. (AFL-CIO Br. 8). The Board's most recent statistical data in § 10(l) situations clearly belie such a contention. Thus, of the total of 1815 charges filed in fiscal year 1968 alleging violations of the secondary boycott provisions of the Act, the Board filed petitions in only 165 of those cases. Thirty-Third Annual NLRB Report, Pages 169 and Table 2. During this same period 65 petitions went to final order with the courts granting injunctions in only 57 cases and denying them in eight. Thirty-Third Annual NLRB Report, pages 169-170.[3] Simi-

[3] Since these statistics reflect many unreported district court cases—Counsel for Regional Director, on February 26, 1970, acceded to our request for substantiation of these statistics. That NLRB General Counsel's corrected summary of records for fiscal 1967 reflects 60 injunctions granted, 8 denied, and 1 granted in part, denied in part.

lar results were shown for the preceding year where only eight injunctions were denied. Thirty-Second Annual NLRB Report, page 219. Thus, the appeal rights which Petitioner seeks to sustain herein would affect less than 1% of all secondary boycott charges filed with the Board and less than 5% of the cases in which the Board, having found reasonable cause to believe that a violation exists, petitions the district courts for injunctive relief. And even with respect to this small number of cases, an injunction will issue *only if* the court of appeals concludes from its careful review of the record that the district court's denial of relief was clearly erroneous.

In light of these statistics, it seems evident that neither the purposes nor policies underlying Norris-LaGuardia are in any way endangered if charging parties are afforded the opportunity to correct the relatively few instances where the district courts erroneously deny the Board's application for injunctive relief and, for reasons best known to the Board, the Board chooses not to appeal.[4]

C. THE LEGISLATIVE HISTORY OF THE TAFT-HARTLEY ACT DOES NOT SUPPORT A NARROW READING OF THE RIGHTS OF CHARGING PARTIES IN SECTION 10(l) PROCEEDINGS

The Regional Director[5] and the Respondent Union[6] argue that the legislative history supports the 10th Circuit's narrow interpretation of the statutory language relating to the rights of charging parties.

fore, that injunctive relief under 10 l has not been improvidently granted; rather, it appears to have been improvidently denied on the occasions of its denial. From this perspective, too, it does not seem that permitting charging parties to seek review of adverse district court orders would revive the abuses which caused the enactment of Norris-LaGuardia or would justify any of the fears expressed in the debates preceding the enactment of Taft Hartley.

[4] See Brief of the Regional Director, Page 13

[5] Brief for Respondent Union, Page 41

which constitutes the terms of the present Act, so far as charging parties' rights are described.

In the light of this background it can fairly be concluded that the compromise in Section 10(l) with respect to charging parties' rights to seek injunctions was arrived at only in order to pass needed legislation over the Presidential veto.[9] Therefore, charging parties' rights in 10(l) proceedings should be broadly construed, subject to the limitations we have urged in Petitioner's Brief, in order to give effect to the strong Congressional purpose to vest substantial judicial rights in charging parties in cases involving secondary boycott activity.

II.

ON THE QUESTION OF MOOTNESS

In its Memorandum in Opposition to Sears' petition for writ of certiorari herein, the Board's principal argument consisted in its claim that the case was now moot and that the petition should, therefore, not be heard by this Court. In its Reply to this Memorandum, Sears responded to this contention.

When this Court subsequently granted Sears' petition, — and without reserving the question of mootness pending argument on the merits, — Sears understood that the issue of mootness was no longer before the Court. Nevertheless, both Respondents and the *amicus curiae* have raised this issue once again in their briefs. To the extent that Sears may be in error in its belief that mootness is no longer a viable issue herein, the following response is made.

[9] Message to Congress, 6 Leg. Ser. Bill Veto p. 1059, 1092

A. THE CASE IS NOT FACTUALLY MOOT: THERE IS A DANGER, IF NOT A PROBABILITY, THAT SEARS WILL BE SUBJECTED TO A RENEWAL OF PICKETING BY RESPONDENT UNION

So far as they relate to the question of mootness, there are few and uncontroverted facts:

1. Respondent Union's unlawful secondary picketing of Sears precipitated the filing of charges by Sears with the Board on August 9, 1968, and caused the Board, after appropriate investigation of the charges, to seek injunctive relief under Section 10(l) of the National Labor Relations Act on August 29, 1968.

2. The District Court refused to grant such injunctive relief in a decision rendered on October 4, 1968.

3. The Board refused to appeal this decision for reasons which it has never disclosed; instead the Board contented itself with prosecuting the Union's unlawful conduct in prolonged and time-consuming administrative proceedings.

4. Sears then sought to appeal the District Court's adverse ruling, an effort which failed when, on May 15, 1968, the Tenth Circuit dismissed the appeal solely on the ground that Sears lacked standing to lodge it.

5. On June 20, 1969, the Board issued its Decision and Order finding the Union guilty of the unfair labor practices charged.

6. The Union engaged in its unlawful picketing continuously and without cease from approximately August 7, 1968 until approximately June 26, 1969.

7. Accordingly, from June 20 until at least June 26, the Union picketed Sears in outright violation of the Board's Order.

8. By letter dated June 26, 1969, the Union, through its counsel, notified the Board's Regional Director that it was undecided as to whether it would comply with the Board's

Order; that it would cease its picketing of Sears only "in the meantime"; and that should the Union elect to resume picketing Sears, it would notify the Board ten days in advance of such resumption.[11]

9. On July 3, 1969, the Union filed a petition to review and set aside the Board's Decision and Order in a case now awaiting decision in the District of Columbia Circuit.[12]

10. This very Union has revealed a ready disposition to engage in those practices which the Board found to be unlawful in its Decision of June 20, 1969, and whose resumption was threatened by the Union in its letter of June 26, 1969. Thus, in four recent instances, three of which occurred subsequent to the Board's Decision in this case, the Board has been forced to seek injunctive relief under Section 10(l) against this same local Union, in the same city, for the same kind of prohibited pressure, against the same class of employers, and pursuant to the same type of dispute, as are involved in the instant Sears case.[13]

In consequence of these enumerated facts, certain conclusions necessarily follow. Respondent Union is engaged

[11] A copy of this letter is attached hereto as Appendix A, page 1. Also attached, as Appendix B, pages 2-5, is a copy of Sear's request, pursuant to which the Union's letter was made available to Sears.

[12] *Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO* v. *NLRB*, Case No. 23223. The Court heard oral argument in this case on January 22, 1970.

The Union's brief in the Court of Appeals, filed on about September 22, 1969, betrays its state of mind on the question of its intention to picket Sears. At page 25 of that brief: "Sears can obtain the immediate surcease of the picketing by the simple measure of giving to its installers the prevailing rates of pay. The Union would then have no cause or reason to continue the picketing and would terminate it forthwith."

[13] Copies of the Board's petitions for injunctive relief under Section 10(l) of the Act in all four instances are attached as Appendices C, D, E, and F, pages 6-31.

in a *continuing* campaign to achieve those ends which it sought in its dispute with Sears. It is prepared to engage in unlawful secondary picketing in furtherance of its imagined interests despite its knowledge that the Board considers such conduct to be illegal. It is prepared to do so, and has done so in this very case, in violation of an outstanding and unequivocal cease-and-desist Order of the Board. Since the Board's Order is not self-enforcing, it offers little deterrence to a Union predisposed to such conduct. Finally, the Union's expressed contemplation of a resumption of picketing emphasizes the jeopardy in which Sears now finds itself as a consequence of the absence of that injunctive relief to which it has always been entitled but has been unable to secure.

The Board's contention that the current appeal is moot is predicated upon the dual assumptions that (i) such injunctive relief is not needed, and (ii) even if it had been granted when sought, it would by now *necessarily* have expired. The fallacy of the first assumption is clear from the foregoing recital of the facts and their implications. The fallacy of the second assumption will now be demonstrated.

B. HAD INJUNCTIVE RELIEF BEEN GRANTED PURSUANT TO SECTION 10(l) OF THE ACT, SEARS COULD PRESENTLY ENJOY THE PROTECTION OF ITS PROVISIONS.

(1) There Has Been No "Final Adjudication of the Board"

Respondent Regional Director contends that injunctive relief under Section 10(l) automatically terminates upon the issuance of the Board's decision on the merits. This view is predicated upon the Regional Director's interpretation of the language of Section 10(l), which provides that injunctive relief may be obtained "pending the final adjudication of the Board". According to his interpretation, the Board's initial Decision and Order is synonymous with "final adjudication" within the meaning of the statute.

That result is required neither by logic, by equity, nor by settled judicial opinion. On the contrary, Sears contends

that a "final adjudication of the Board" should represent only that decision which ultimately and absolutely disposes of the disputed rights and duties of the parties. Accordingly, when the parties effect an amicable settlement of their dispute, which settlement is approved by the Board, that approval constitutes a "final adjudication" as nothing further remains to be resolved. Similarly, when neither party contests the terms of a decision of the Board, that, too, becomes a "final adjudication".

However, when an aggrieved party to a Board decision seeks review in the Court of Appeals, that decision loses its "finality". The court may enforce the Board's Order in whole, in part, or not at all; to the extent it refuses enforcement, the court may remand the case to the Board for a reconsideration of a legal judgment, for the taking of additional testimony, or for both. In circumstances where such appellate review is sought, to label the decision being reviewed a "final adjudication" constitutes an abuse of logic and language. In the instant case, Respondent Union's election to file the currently pending suit in the District of Columbia Circuit to review and set aside the decision of the Board which found the Union in violation of law, removed the "finality" from the Board's adjudication.[11]

Support for Sears' position is found in *Houston Insulation Contractors Association* v. *N. L. R. B.*, 339 F. 2d 868 (C.A. 5, 1964). One of the issues in that case concerned the effect of a district court's action in granting injunctive relief under Section 10(l) "pending the final disposition of the matters involved". The court considered whether this grant of relief was impermissibly broad since it would extend beyond the mere issuance of the Board's decision and

[11] There is no reason in logic why a decision of the Board may not constitute a "final order" such that it becomes ripe for appeal, while concurrently constituting less than a "final adjudication" of the dispute so that continuing unlawful conduct may remain enjoinable under Section 10(l).

until the Court of Appeals rendered its own opinion on the merits of the Board's adjudication. The Fifth Circuit agreed that while the district court's action had precisely the effect of prolonging the protection afforded by injunctive relief beyond the mere issuance of the Board's decision, such a result was consistent with the purpose and provisions of the statute:

> "We do not read [the district court's] language as going beyond the premissible scope of an injunction under § 10(l)—'appropriate injunctive relief pending the final adjudication of the Board'."

The Court's conclusion that an adjudication is not "final" when it is subject to reversal, amendment or remand, and when it does not, therefore, constitute "final disposition of the matters involved", is also supported by equitable considerations. Suppose a union were enjoined from engaging in unlawful secondary picketing pursuant to a proceeding under Section 10(l) of the Act. According to the Regional Director's contentions herein, upon the rendering of the Board's non-self-enforcing decision on the merits, the offending union becomes free of the terms of the injunction and free to resume its unlawful picketing.[15] Such a result, held the Fifth Circuit in the *Houston* case, serves, where appellate review is sought:

> ". . . to justify preserving the status quo until the case is finally disposed of in this [appellate] Court. Were

[15] Under this view a resumption of the unlawful conduct could only be remedied by the Board's institution of a new suit for injunctive relief under Section 10(e) of the Act. But the Board is not required and cannot be compelled to do so. Moreover, Sears' experience in the instant case,—where the Board declined to appeal a district court's refusal to grant injunctive relief which the Board believed should have been granted—does not encourage reliance on the Board. In any event, the theoretical availability of such a tenuous concurrent remedy is no substitute for the quicker and more dependable relief afforded by the continuing protection of Section 10(l).

petitioner to ultimately prevail, the beneficial effect of our decision would be largely vitiated, if while awaiting hearing and disposition, the Union were permitted to resume its activities."

(2) The Board's Decision and Order Did Not Decide the Question Involved in the Instant Appeal

An additional and independent basis for rejecting the Regional Director's claim of mootness consists of the fact that the Board's decision, whether or not it is "final", did not adjudicate the question presented to this Court for review. The Board's opinion decided that the Respondent Union violated the labor laws and, by necessary implication, that the district court's refusal to grant injunctive relief was incorrect. But the question presented here for review relates to whether charging parties before the Board have standing to appeal the denial of injunctive relief,—not whether the denial itself was correct. Thus the question before this Court neither was, nor could have been, decided by the Board and, moreover, is totally unaffected by the merits of the Board's decision.

Nor do the authorities cited by the Regional Director or the Respondent Union require the dismissal of this appeal. *Carpenters' District Council* v. *Boire*, 228 F. 2d 454 (CA 5, 1961), involved a situation where the parties executed a formal voluntary bilateral settlement stipulation *following* the union's appeal of the granting of an injunction under Section 10(l). Since the stipulation resolved all matters involved in the injunctive proceeding, the Board's approval of it constituted a "final adjudication" which did render further litigation concerning the injunction moot.

This is entirely consistent with Sears' previously expressed understanding of the meaning of "final adjudication" in Section 10(l). And in both *Monique, Inc.* v. *Boire*, 344 F. 2d 1017 (CA 5, 1965), and *Reynolds* v. *Nashville Bldg. Trades Council*, 383 F. 2d 562 (CA 6, 1967), cited by Respondents, the Board rendered a decision on the merits, while appeals were pending from adverse rulings in cases

under Section 10(l), which also resolved the questions presented in the suits under Section 10(l). Thus a decision by the Courts on the appeals stemming from the injunction proceedings involved nothing more than a review of the merits of the Board's decision. In a sense, therefore, the two cases became merged, with "mootness" the consequence of the merger.

In the instant appeal no such merger has occurred since the issue of standing to seek appellate review, which Sears presented to the Tenth Circuit and raises again here, cannot be decided by the Board either directly or indirectly, but is only for the courts to adjudicate.

C. MOOTNESS CANNOT BE ASSERTED SO AS TO DENY JUDICIAL REVIEW OF SHORT-TERM ORDERS WHICH ARE CAPABLE OF REPETITION AND WHICH CONSTITUTE PRECEDENT IN FUTURE SIMILAR INSTANCES

Wholly apart from the considerations raised in the foregoing discussion of the elements of the Regional Director's contentions, other factors basic to a just and efficient judicial system impel the conclusion that the instant appeal is not moot.

If the Regional Director is correct in contending that injunctive relief under Section 10(l) necessarily terminates when the Board renders its decision on the merits of the case, then the period during which such relief can exist is quite short. In the instant case, approximately eight and one-half (8½) months elapsed between the district court's ruling on the petition for injunctive relief and the subsequent issuance of the Board's decision. There is no reason known to Sears for doubting that this constitutes a typical period.

Under such circumstances, it would be virtually impossible ever to bring to this Court a case involving charges of judicial malfunction concerning or arising out of the granting or denying of injunctive relief; all such cases would become "moot" as they travelled their way through all the

time-consuming stages of the judicial process which arrives, after the issuance of the Board's decision, in this Court. Yet each error committed below becomes precedent to be used against the interests of litigants who will be similarly unable to obtain review of their own "mooted" appeals. If this Court is ever to decide whether charging parties before the Board have standing to appeal a district court's denial of injunctive relief under Section 10(l), then its vehicle must be such a case as Sears brings here.[16]

Under the circumstances described, this Court has declared its refusal to apply the doctrine of mootness. In *Southern Pacific Terminal Company v. Interstate Commerce Commission, et al.*, 219 U.S. 498, 515-6, the appellant sought to have declared illegal an order of limited duration of the I. C. C., which had expired by its own terms while pending appeal. The Commission defended on the ground that the case had become moot. This Court held that the doctrine of mootness does not apply to such situations, in which public rights and interests are involved and questions of law are presented, whose resolution "might serve to guide the municipal body when again called upon to act in the matter". This Court's extended rationale of its decision in *Southern Pacific* applies equally here:

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the

[16] A further difficulty in bringing such cases to this Court results from the fact that a majority of the charges filed with the Board involving violations of law which could result in injunctive relief under Section 10(l) are filed by small employers. During fiscal year 1968, over fifty per cent (50%) of such charges were filed by employers having less than thirty (30) employees. It is unlikely that such employers would be able or willing to expend such sums as would be required to bring their cases here even if they had no reason to fear their being "mooted" out of Court.

case at bar) and their consideration ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

The continuing vitality of the *Southern Pacific* doctrine is evidenced by this Court's recent application of it in *Moore* v. *Ogilvie*, 394 U.S. 814. Nor has that doctrine been affected, as Respondent Union suggests (Br., p. 20), by this Court's decisions in *Brockington* v. *Rhodes*, 396 U.S. 41, and *Hall* v. *Beals*, 396 U.S. 45. The latter cases involved situations in which an individual sought to run for elective office in a specific election (*Brockington*) and vote in a specific election (*Hall*) and was prevented from doing so pursuant to the operation of a statute which had since been amended. Thus, a repetition of the precise injury claimed could never occur; the specific election had passed and the statute had been "corrected." In both *Moore* and the instant case the situation is quite different, as a repetition of the claimed injury was both possible and likely. In the instant case, for example, in any succeeding 10(b) case in which Sears will be involved the same problem of its standing to appeal adverse district court decisions will confront it, pursuant to the same statutory language which is involved here. Moreover, the adverse precedent established by the court below will continue to exert some influence, unless reversed, on every other court in which Sears would seek similar appellate review.

D. THE PUBLIC INTEREST IN THE CLARIFICATION OF CHARGING PARTIES' APPELLATE RIGHTS PRECLUDES A FINDING THAT THE ISSUE IS MOOT

Administrative agencies function essentially as trustees for the public under trusts created by Congress for the welfare and protection of the beneficiaries. The public has a substantial and legitimate interest in the develop-

volving another secondary boycott, the Second Circuit held that

> "Finally, termination of the picketing, the walkout and the particular job itself do not render the Board's order moot."

Decisions of the Sixth Circuit are to like effect, as in *NLRB v. Rockwell Standard Corporation*, 330 F. 2d 280 (C.A. 6, 1964), in which the Court stated that

> "Abandonment of an unfair labor practice does not cause the controversy to become moot."

In *NLRB v. Metal Sweepers, Inc.*, 325 F. 2d 551 (C.A. 7, 1963), the Seventh Circuit expressed its concern over the very present possibility of the resumption of discontinued unfair labor practices. In a case involving alleged unfair labor conduct in connection with a first election, the Board's final and valid second election had been held. The Court stated:

> "Neither compliance with the Board's order nor subsequent certification of the union as bargaining representative renders the case moot. . . . If the employer's motive in the past was to repeat it, how a decision to be legally will not be a futile exercise of judicial function."

These principles have found expression in the cases of *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563 (1950); *NLRB v. Pacific Gas and Electric Co.*, 118 F. 2d 780 (C.A. 9, 1941); *NLRB v. Dinion Coil Co.*, 201 F. 2d 484 (C.A. 2, 1953); *NLRB v. Entwistle Mfg. Co.*, 120 F. 2d 532 (C.A. 4, 1941); *NLRB v. Ford Motor Co.*, 114 F. 2d 905 (C.A. 6, 1940); *NLRB v. Cheney California Lumber Co.*, 327 F. 2d 795 (C.A. 9, 1964); *NLRB v. Local 294, International Brotherhood of Teamsters*, 282 F. 2d 699 (C.A. 2, 1960); *NLRB v. Local 138, International Union of Operating Engineers*, 257 F. 2d 491 (C.A. 2, 1958); *NLRB v. Local 282, International Brotherhood of Teamsters*, 257 F. 2d 503

stance where the discontinuance occurs after the Board renders its decision as well as before administrative consideration. It has applied to proceedings before the Board and proceedings before the courts of enforcement.

A very recent example of the approach taken by the Board in cases involving the issue of mootness where unfair labor practices have been discontinued and the underlying dispute has been settled in the course of litigation appears in *Hood Industrial Workers of America*, 171 NLRB No. 61 (1968). In that case the Union discontinued its unlawful secondary picketing and executed a collective bargaining agreement with the employer subsequent to the Trial Examiner's finding that unfair labor practices had been committed. The Union and the employer jointly sought the withdrawal of proceedings pending before the Board's consideration of the Trial Examiner's decision on the ground that the matter had become settled and moot. In opposing such withdrawal, the Board's General Counsel argued that the violations which were committed were of a recurring and continuing nature, and that the establishment of a labor agreement in other circumstances [illegible] the unfair labor practice charges of discriminatory discharge and refusal to bargain. The Board agreed with the General Counsel and denied the request to withdraw the charges. [illegible] the dispute nevertheless was not to be considered moot because the [illegible] employer might [illegible] the [illegible] proceedings which would [illegible] a possible [illegible] of unlawful picketing conditions would arise and

An appropriate conclusion to this discussion consists in a famous quotation from *NLRB v. General Motors Corp.*, 179 F. 2d 221 (C.A. 2, 1950), which summarizes the bases for rejecting the concept of mootness in the instant case as well as those which were discussed above:

> "The defendant in an action for an injunction never as a matter of right becomes entitled to a dismissal because after process served he discontinues the conduct of which the plaintiff complains. It is for the court to say whether the plaintiff shall be compelled to accept his assurance that he will not resume what he should not have begun. After all, no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing sanctions that of punishment for contempt, is not a circumstance to which a court will ordinarily lend a friendly ear. The defendant on his part can invoke no other interest except an escape from whatever stigma attaches against him, and to the court's refusal to accept his promise that he will not repeat the wrong. Ordinarily, that will not be a sufficient weight to the protection of which the plaintiff has shown he was once in need, and which he will need again should the defendant change his mind."

Respectfully submitted,

GERARD SWEENEY,
Attorney for Petitioner.

APPENDIX A

PHILIP HORNBEIN, JR.
Attorney at Law
2007 Security Life Building
Denver, Colorado 80202

June 26, 1969

Mr. Francis Sperandeo, Regional Director
National Labor Relations Board
260 New Custom House
Denver, Colorado 80202

Re: Sears, Roebuck and Co.
Case No. 27-CC-278.

Dear Mr. Sperandeo:

This will confirm my telephone conversation with Mr. Bruce Gillis on this date. I informed him that the Union has not yet decided whether or not to voluntarily comply with the Board's order, but that in the meantime all picketing of Sears will be discontinued.

I further advised Mr. Gillis that we will not resume picketing of Sears without first giving your office at least ten days notice in advance thereof.

Very truly yours,

s/ PHILIP HORNBEIN, JR.
Philip Hornbein, Jr.

PHjr:w

c: Carpet Layers Local Union No. 419.

APPENDIX B

SEARS, ROEBUCK AND CO.
Chicago, Illinois 60607,
Phone 265-2500.

Law Department

September 18, 1969

Francis Sperandeo, Esq.
Regional Director,
Twenty-Seventh Region
National Labor Relations Board
260 New Custom House
Denver, Colorado

Re: Carpet, Linoleum, Soft Tile and
Resilient Floor Covering Layers,
Local Union #419, AFL-CIO

and

Sears, Roebuck and Co.
176 NLRB No. 120 (Civil No. C 1052)

Dear Mr. Sperandeo:

This letter constitutes a formal request by Sears, Roebuck and Co. for information from your files to which Sears believes it is entitled in connection with the captioned cases.

You will recall that in our recent conversation in your offices on September 11, 1969 you confirmed my understanding that sometime subsequent to the issuance of the Board's Order in this case the Union, through its counsel, announced to you by letter its intention to cease for the present its adjudicated unlawful picketing to give you ten (10) days notice should that picketing be resumed, and stated its indecision as to whether to appeal the Board's Order.

We hereby request a copy of the Union's letter

In order to place the relevance of that letter in proper perspective, you will further recall the following background facts:

A. On August 29, 1968 pursuant to a charge filed by Sears protesting the Union's unlawful secondary picketing, your office petitioned the District Court for mandatory injunctive relief under Section 10(l) of the Act.

B. On October 4, 1968 the District Court refused to grant the requested injunctive relief. Sears then appealed this decision to the Tenth Circuit Court of Appeals.

C. On May 15, 1969 the Court of Appeals dismissed Sears' appeal on the ground that Sears lacked standing to prosecute it; the Court did not reach the merits of the dispute.

D. On June 20, 1969 the Board issued its decision finding that the Union had in fact engaged in the unlawful picketing as charged by Sears and as the Board's petition for injunctive relief had alleged.

E. The Union had continued its unlawful picketing throughout this entire period and even subsequent to the Board's Order.

F. On June 6, 1969 as a consequence of the Union's continuing picketing, Sears filed motions for a stay of mandate of the Tenth Circuit and for an injunction pending its appeal of the Tenth Circuit's decision.

G. At the time that Sears' afore described motions were pending the Board conveyed both to counsel for the Union and for Sears its intention to seek injunctive relief against the Union's violation of the Board's Order to cease the continuing unlawful picketing.

H. The Union's letter to which the instant request is addressed was received by you enroute [illegible]

date of the Union's petition for review of that Order in the Court of Appeals for the District of Columbia Circuit on July 3, 1969. Further, this letter was written at a time when Sears' motion for interim injunctive relief was pending and when the Board was preparing independently to seek such relief under Section 10(e) of the Act.

Accordingly, the Union's letter had the effect of terminating or preventing the institution by the Board of projected proceedings in the District Court; it unilaterally affected the remedy to which Sears, as the aggrieved charging party, was entitled and would enjoy as a consequence of that suit; and it effectively undercut Sears' own pending motion for interim injunctive relief.

Under these circumstances, Sears believes that the Union's letter to which we refer constitutes an unauthorized ex parte communication within the meaning and spirit of the Public Information Act, 5 U.S.C. §552 and Section 102.126 of the Board's Rules and Regulations. Although Section 102.128(c) of the Board's Rules appears to limit this doctrine to proceedings before Trial Examiners in cases pending before them, it is clear that the spirit and the very purpose of these Rules requires their extension to all stages of Board proceedings or of resulting court proceedings in which the communication in question has the effect, in the terms of Section 102.126, of "concerning the disposition on the merits of the substantive and procedural issues in the proceeding". Since, as we have noted, the ex parte communication involved here had the effect of forestalling the institution of an action by the Board and also deprived Sears of a desired remedy available therein, the explicit condition for identifying "unauthorized" communications has been met. Sears therefore believes it

purpose to the various situations in which they logically apply, we respectfully direct your attention to various Appellate Court decisions which have effected such extensions in keeping with the spirit of these Rules to enlarge the exchange of relevant information between interested parties. See, for example, *Board of Manitowoc* v. *NLRB*, 335 F. 2d 749 (CA 9, 1964); *NLRB* v. *Safeway Steel Scaffold Co.*, 383 F. 2d 749 (CA 9, 1964); *NLRB* v. *Safeway Steel Scaffold Co.*, 383 F. 2d 273 (CA 5, 1967), cert. den. 390 U.S. 955 (1968); *Pakwaukee* v. *U. S.*, 360 U.S. 343 (1959); and *NLRB* v. *Borden Co.*, 392 F. 2d 412 (CA 5, 1968).

When Sears made an oral request to you on September 11, 1969, for a copy of the Union's letter, you indicated that you would not provide such a copy without the consent of the Union's counsel. That consent was not received. While you thus declined to furnish Sears with a copy of that letter, you did describe its contents, as has been detailed above. In a telephone conversation today, your office indicated a current intention to adhere to your prior decision. This formal request is written in the hope and expectation that upon further consideration, you will reverse that decision. However, if we do not receive a response from you by September 24, 1969, we shall assume that you continue to adhere to your prior refusals.

We should like to add that a copy of this letter is being forwarded to the Union, in accordance with the salutary principle that ex parte communications should be discouraged.

Your expeditious response to this formal request would be greatly appreciated.

Very truly yours,

3. On or about July 29, 1969, Sanders Carpets & Draperies, Inc. (herein called Sanders), pursuant to the provisions of the Act filed a charge with the Board alleging, *inter alia*, that Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO (herein called Respondent), a labor organization, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. A copy of said charge is attached hereto as Exhibit A and made a part hereof.

4. The aforesaid charge was referred to Petitioner as Regional Director of the Twenty-Seventh Region of the Board.

5. Upon the basis of the following, the Petitioner has reasonable cause to believe that the said charge is true insofar as it alleges that Respondent has violated Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, and that a complaint of the Board, based on said charge should issue against Respondent pursuant to Section 10(b) of the Act. More particularly, Petitioner has reasonable cause to believe, and believes, that Respondent, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, is a labor organization within the meaning of Section 2(5), 8(b), 8(e), and 10(l) of the Act, and has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal office at 1129-15th Street, Denver, Colorado, and at all times material herein, Respondent has been engaged within this judicial

district in transacting business and in promoting and protecting the interests of the employee members of Respondent.

(c) At all times material herein George Cooney has been financial secretary and business manager of the Respondent, and Paul G. Wishard and Richard Giesler have been field representatives of Respondent.

(d) Sanders, a Colorado corporation, is engaged at 429 South Colorado Boulevard, Denver, Colorado, in the sale and distribution of carpets at retail. In the course and conduct of its business, Sanders annually distributes and sells annually within the State of Colorado, goods and materials and other merchandise having a gross value in excess of $500,000, of which goods and materials valued in excess of $50,000 are transported directly to the State of Colorado from points outside that State.

(e) At all times material herein, Sanders has not been engaged in business in the construction industry.

(f) At all times material herein, Sanders, in the course and conduct of its business, has subcontracted all of its carpet installation work and has employed no employees for the purposes of installing carpet.

(g) Sanders is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

(h) James Leeman and Donald D. Goldtrap are engaged as a partnership in the business of carpet installing in Denver, Colorado. In the course and conduct of its business, Leeman and Goldtrap regularly provide services to Sanders, among others.

(i) On or about July 15, 1966, Respondent and Sanders executed a written agreement effective from July 1, 1966, until July 31, 1969, whereby Sanders agreed to give all of its floor covering work to a concern, or concerns, paying

prevailing union wages and paying all fringe benefits as provided for in the Collective Bargaining Agreement entered into by Respondent and other floor covering employers. A copy of said Agreement is attached hereto and made a part hereof, as Exhibit B.

(j) At no time material herein has Respondent been the collective bargaining representative of any employees of Sanders.

(k) On or about July 29, 1969, Respondent demanded that Sanders enforce the above contract provisions that would require Sanders to give all of its floor covering work to a concern or concerns paying certain prevailing union wages and paying Union fringe benefits and to cease doing business with other persons who do not pay the specified rates and fringe benefits.

(l) Since on or about July 28, 1969, Respondent has attempted to force or require Sanders to cease using, selling, handling, transporting or otherwise dealing in the products of Goldtrap and Leeman, or to cease doing business with Goldtrap and Leeman.

(m) In furtherance of the aforesaid attempt to force or require Sanders to cease using, selling, handling, transporting or otherwise dealing in the products of Goldtrap and Leeman, or to cease doing business with Goldtrap and Leeman, and in furtherance of the aforesaid attempt by Respondent to compel Sanders to enforce the aforementioned contract provisions, since on or about July 28, 1969, Respondent did authorize, establish, and maintain pickets at the premises of Sanders at its place of business at 429 South Colorado Boulevard, Denver, Colorado.

(n) By the acts and conduct set forth in subparagraphs (k), (l), and (m) above, Respondent has engaged in, and has induced and encouraged individuals employed by Sanders to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport,

or otherwise handle or work on goods, articles, materials, or commodities, or to perform services, and has threatened, restrained and coerced Sanders.

(o) An object of the acts and conduct engaged in by Respondent, set forth in paragraphs (k), (l), (m) and (n) above, was, and is, to force or require Sanders to cease using, selling, handling, transporting, or otherwise dealing in the products of, and to cease doing business with the partnership of Goldtrap and Leeman.

6. It may be fairly anticipated that, unless enjoined, Respondent will continue or repeat the acts and conduct set forth in paragraph 5, subparagraphs (k), (l), (m), (n), and (o) above, or similar or like acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. It is therefore essential, appropriate, just and proper for the purposes of effectuating the policies of the Act in accordance with the provisions of Section 10(l) thereof, that, pending final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

WHEREFORE, Petitioner prays:

1. That the Court issue an Order directing Respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participating with them, pending the final disposition of the matters involved herein pending before the Board from:

(a) Picketing at or in the vicinity of the premises of Sanders or at locations where Sanders' products are being installed.

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Sanders, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Sanders, or any other persons engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Sanders or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of or to cease doing business with the partnership of Goldtrap and Leeman.

2. That upon return of said Order to Show Cause, the Court issue an Order enjoining and restraining Respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Denver, Colorado, this 12th day of August, 1969.

/s/ FRANCIS SPERANDEO,
Francis Sperandeo,
Regional Director
Twenty-Seventh Region
National Labor Relations Board

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

JULIUS G. SEROT,
Assistant General Counsel,

W. BRUCE GILLIS, JR.,
Regional Attorney, Region 27.

/s/ RICHARD J. WISE
Richard J. Wise,
Board Attorney

National Labor Relations Board
Twenty-Seventh Region
260 New Custom House, 721 - 19th Street
Denver, Colorado Telephone 297-3551

I, the undersigned, Clerk of the United States District Court for the District of Colorado, do certify that the foregoing is a true copy of an original document remaining on file and record in my office.

Witness my hand and Seal of said Court this 16th day of September 1967.

G. WALTER BOWMAN,
Clerk

By /s/ R. J. HALL,
Deputy

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil No. C-672

CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CARPET, LINEOLEUM AND RESILIENT TILE LAYERS UNION No. 419, AFL-CIO, *Respondent.*

Petition for Injunction Under Section 10(l) of the National Labor Relations Act, as Amended

To the Honorable, the Judges of the United States District Court for the District of Colorado:

Comes now Clyde F. Waers, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U. S. C., 160(1) (herein called the Act) for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on a charge alleging that Respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(7), subparagraph (C) of the Act. In support thereof, Petitioner respectively shows as follows:

1. Petitioner is Regional Director of the Twenty-Seventh Region of the Board, an agency of the United States, and files this Petition for and on behalf of the Board.

2. Jurisdiction of this Court is involked pursuant to Section 10(1) of the Act.

3. On or about January 2, 1968, Aristocraft Counter and Floor Covering, Inc. (herein called Aristocraft), pursuant to provisions of the Act, filed a Charge with the Board alleging that Carpet, Lineoleum and Resilient Tile Layers Local Union No. 419, AFL-CIO (herein called Respondent), a labor organization, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(7), subparagraph (C) of the Act. A copy of said Charge is attached hereto as Exhibit 1 and made a part hereof.

4. The aforesaid Charge was referred to Petitioner as Regional Director of the Twenty-Seventh Region of the Board.

5. Upon the basis of the following, Petitioner has reasonable cause to believe that said charge is true and has accordingly on January 22, 1968, on behalf of the Board, issued a Complaint of the Board based on said Charge pursuant to Section 10(b) of the Act. A copy of said Complaint is attached hereto as Exhibit 2 and made a part hereof. More particularly, Petitioner has reasonable cause to believe, and believes, that Respondent is a labor organization within the meaning of Section 2(5), 8(b), and 10(1) of the Act, that George Cooney, Paul Wishard, and Billy Vice are agents of Respondent within the meaning of Section 2(13), 8(b) and 10(1) of the Act, and that said Respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(7), subparagraph (C) of the Act, affecting commerce within the meaning of Sections 2(6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) At all times material herein, George Cooney has been financial secretary of Respondent, Paul Wishard has

been Business Representative of Respondent, and Billy Vice has been an employee and agent of Respondent.

(c) Respondent maintains its principal office at Denver, Colorado, and at all times material herein, Respondent has been engaged within this judicial district in transacting business and in promoting and protecting the interests of the employee members of Respondent.

(d) Aristocraft is engaged at Denver, Colorado, in the sale and installation of floor covering and tile. During the last twelve months, which period is representative of all times material herein, Aristocraft, in the course and conduct of its business operations, received goods and materials valued in excess of $7,000 at its Denver, Colorado, operation, directly from points outside the State of Colorado; and received goods and materials valued in excess of $50,000 at its Denver, Colorado, operation from other enterprises, including *inter alia*, William Volker & Company, Larson Distributing Company, Western Appliance Corp., Wholesale Flooring, Inc., Wholesale Ceramic Tile, Inc., and Downs Supply Co., all of Denver, Colorado, which other interprises had received the said goods and materials directly from points outside the State of Colorado.

(e) Respondent is not currently certified as the representative of any of Aristocraft's employees.

(f) No charge has been filed with the Board under Section 8(a)(2) of the Act alleging that Aristocraft has unlawfully recognized, or assisted any labor organization.

(g) Notwithstanding the aforesaid, Respondent, since on or about August 8, 1967, has demanded that Aristocraft recognize and bargain with Respondent as the representative of Aristocraft's floor covering and tile installation employees, and Respondent has been attempting to compel Aristocraft's floor covering and tile installation employees to accept or select Respondent as their collective bargaining representative.

(h) In furtherance of the aforesaid demand for recognition and bargaining and attempt to compel Aristocraft's floor covering and tile installation employees to accept or select Respondent as their collective bargaining representative(Respondent, at all times material since on or about December 7, 1967 (excluding the period from January 3 to January 8, 1968), has picketed Aristocraft at various of Aristocraft's job installation sites in Denver, Colorado.

(i) An object of Respondent's picketing set forth in subparagraph (h) above, is to force or require Aristocraft to recognize or bargain with Respondent as the representative of Aristocraft's floor covering and tile installation employees, and to force or require Aristocraft's floor covering and tile installation employees to accept or select Respondent as their collective bargaining representative notwithstanding that Respondent is not currently certified as a representative of such employees.

(j) Respondent engaged in the activity set forth in paragraph 5, subparagraphs (h) and (i) above notwithstanding that no valid petition under Section 9(c) of the Act involving employees of the Employer has been filed within a reasonable period of time from the commencement of such picketing.

(k) It may fairly be anticipated that, unless enjoined, Respondent will continue or repeat the acts set forth in paragraph 5, subparagraphs (h) and (i) above or similar or like acts and conduct in violation of Section 8(b)(7), subparagraph (C), of the Act. It is therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 10(l) thereof, that, pending final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

Wherefore, Petitioner prays:

1. That the Court issue an order directing Respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue, enjoining and restraining Respondent, its officers, agents, servants, employees, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved herein pending before the Board, from:

(a) Continuing their current picketing of Aristocraft, where an object thereof is to force or require Aristocraft to recognize or bargain with Respondent, or any other labor organization, as the reprsentative of Aristocraft's floor covering and tile installation employees, or to force or require Aristocraft's employees to accept or select Respondent, or any other labor organization, as their collective bargaining representative until the Board determines that a question concerning representation of Aristocraft's employees may appropriately be raised under Section 9 of the Act.

2. That upon return of said order to show cause, the Court issue an order enjoining and restraining Respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Denver, Colorado, this 23rd day of January, 1968.

/s/ CLYDE F. WAERS
Clyde F. Waers,
Regional Director
National Labor Relations Board
Twenty-Seventh Region
260 New Custom House
721 19th Street
Denver, Colorado 80202

ARNOLD ORDMAN,
General Counsel

DOMINICK L. MANOLI,
Associate General Counsel

JULIUS G. SEROT,
Assistant General Counsel

FRANCIS SPERANDEO,
Regional Attorney, Region 27

W. BRUCE GILLIS, JR.,
Attorney

RICHARD J. WISE,
Attorney
National Labor Relations Board
Twenty-Seventh Region
260 New Custom House
721 19th Street
Denver, Colorado 80202
Telephone No. 297-3551

I, the undersigned, Clerk of the United States District Court for the District of Colorado, do certify that the foregoing is a true copy of an original document remaining on file and record in my office.

Witness my hand and Seal of said Court this 16th day of Sept. 1969.

G. WALTER BOWMAN,
Clerk

By /s/ R. J. HALL,
Deputy

APPENDIX G

February 10, 1969

Mr. Arnold Ordman
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Re: Sears, Roebuck and Co. Case No. 27-CC-278

Dear Mr. Ordman:

As you probably know by this time Trial Examiner Maurice M. Miller issued his decision in the above-captioned case on February 6, 1969. In his decision he found that the activity engaged in by the Respondent Union was violative of Section 8(b)(4)(B).

On September 27, 1968 the District Court for the District of Colorado denied to the Regional Director a temporary restraining order which he sought pursuant to Section 10(l) of the Act. It is obvious that the District Court did not understand its role in a Section 10(l) proceeding and, if the District Court had the advantage of the Trial Examiner's thinking, he would not have dismissed the petition. Therefore, on behalf of Sears, Roebuck and Co., it is hereby requested that you now proceed pursuant to Section 10(j) of the Act and once again request temporary relief from the District Court. In the alternative, we suggest that you join with us in our appeal before the United States Court of Appeals for the Tenth Circuit.

When the violation of the Act is as obvious as it is in this case, we would think that the General Counsel's office would be able to afford us with some relief.

Very truly yours,

Kalvin M. Grove
For Lederer, Barnhill & Fox

cc: Mr. Julius Serot
Associate General Counsel

cc: Mr. Francis Sperandeo
Regional Director—Denver

APPENDIX H

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D. C. 20570

February 26, 1969

Kalvin Grove, Esquire
Lederer, Barnhill and Fox
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

Re: Sears, Roebuck and Co. Case No. 27-CC-278

Dear Mr. Grove:

Your letter of February 10, 1969, to the General Counsel has been referred to me.

The issuance of the Trial Examiner's Decision does not in our view warrant any further proceedings in the district court or any appeal on our part from the dismissal of the 10(l) petition, even assuming that the Rules of Civil Procedure or other rules of court permitted such proceedings at this time. Although the Trial Examiner's Decision might have had some relevance to the question of reasonable cause had it been issued prior to the determination by the district court it is, of course, only a recommendation to the Board rather than a Board decision and in the circumstances does not warrant reopening of the district court proceedings. Nor do we believe that it would be appropriate to institute new proceedings under Section 10(j) of the Act, even if that Section were applicable to this type of unfair labor practice, to secure the relief under this section, upon the same evidence, which a district court has already denied.

Additionally, with respect to our participating as an appellant in the pending appeal, we note that the time for us to appeal has long since expired.

I do not suggest that we agree with the dismissal of our petition nor that we disagree with the Trial Examiner's Decision. We are of the opinion, however, for the foregoing reasons, that the action you request us to take would not be warranted.

With kind regards,

Sincerely,

JULIUS G. SEROT
Julius G. Serot
Assistant General Counsel